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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE THE CAMPAIGN FOR TOBACCO-FREE KIDS, THE AMERICAN LUNG ASSOCIATION, THE AMERICAN HEART ASSOCIATION, THE AMERICAN CANCER SOCIETY AND THE AMERICAN LEGACY FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a cigarette manufacturer, while profiting from its marketing and sale of "light" cigarettes to the general public, is entitled to have cases brought against it entirely under state law removed to federal court pursuant to 28 U.S.C. § 1442(a)(1).

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INTEREST OF *AMICI CURIAE*[1]

The Campaign for Tobacco-Free Kids, the American Lung Association, the American Heart Association, the American Cancer Society and the American Legacy Foundation submit this brief as *amici curiae* in support of Petitioners Lisa Watson and Loretta Lawson.

The Campaign for Tobacco-Free Kids is a 501(c)(3) nonprofit organization that works to promote public and private policies to prevent and reduce tobacco use and its harms, especially among children. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms among children and others.

The American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with volunteers and affiliates in all 50 states, the District of Columbia and Puerto Rico. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education and public policy advocacy on the adverse health effects of tobacco

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amici curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

products. ALA has advocated for the regulation of tobacco products for more than two decades.

The American Heart Association ("AHA") is a nonprofit, voluntary health organization with nearly 2,000 community organizations in all 50 states, the District of Columbia and Puerto Rico. AHA's mission is to reduce disability and death from cardiovascular diseases and stroke, including those caused by or exacerbated by cigarette smoking. AHA has a long and active history before Congress and regulatory agencies on tobacco and health-related matters and has petitioned the FDA on several occasions seeking regulation of cigarettes and other tobacco products under the Food, Drug, and Cosmetic Act.

The American Cancer Society, Inc. ("ACS") is the nationwide community-based public health organization with three million volunteers dedicated to eliminating cancer as a major health problem through research, advocacy, education and service. Research conducted and supported by ACS since the 1950s has played a pivotal role in identifying the use of tobacco products as a major cause of cancer.

The American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots

marketing campaigns, research, public relations and outreach to populations disproportionately affected by the toll of tobacco.

Together, *amici* have been in the vanguard of the public health community's efforts to develop and disseminate accurate and truthful information regarding the health hazards posed by smoking. *Amici* seek to disabuse the American public of the widely-held misconception that smoking "light" or "low tar" cigarettes represents a safer alternative to smoking regular cigarettes – a misconception that Philip Morris and other tobacco companies perpetuate to this day through their marketing and advertising practices in order to maintain and expand their consumer base.

Based on their combined expertise and interest in the subject matter, *amici* respectfully submit this brief to offer guidance regarding the issue before this Court: whether the Federal Trade Commission ("FTC") has exerted such comprehensive regulatory control over tobacco companies' marketing of so-called "light" cigarettes that Philip Morris may qualify as a "person acting under a federal officer" for the purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

SUMMARY OF ARGUMENT

Philip Morris is not entitled to remove a state law action filed in state court pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), under the Eighth Circuit's test or any other standard that ascribes weight to the comprehensiveness and detail of federal control. Philip Morris has *voluntarily* marketed Marlboro Lights and Cambridge Light cigarettes as

either "light" or "lowered in tar and nicotine" in a manner not subject to FTC control. In fact, Philip Morris on its own chose the "light" descriptor for its products based upon "Cambridge Filter Method" ("Cambridge Method") test results despite knowing that these results were misleading the FTC and consumers. The Eighth Circuit erred in construing the applicable facts and, as a result, misapplied the law. A review of the history of the development and marketing of cigarettes with such descriptors as "light" or "lowered in tar or nicotine" and of the FTC's attention to the issue invariably leads to the conclusion that the FTC does not regulate, let alone control, the use of any of the descriptors at issue in this case.

The FTC's lack of regulation in this area and the FTC's lack of authority to enforce any particular standard for the use of descriptors, as evidenced by Philip Morris's own recent petition to the FTC to undertake such regulation, indicate that there has been no federal direction, let alone a colorable federal defense to the underlying claim. This action was removed to federal court erroneously and this Court, accordingly, should reverse.

ARGUMENT

The Court of Appeals for the Eighth Circuit held that a private actor may qualify as a "person acting under a federal officer" for the purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), when the actor is "comprehensively regulated" by a federal agency. It then seriously erred in applying its own standard to the historical record, concluding that the FTC controls or directs Philip Morris's marketing of

Marlboro Lights as "light" and "lowered in tar and nicotine."

I. The History of "Light" Cigarettes and the FTC's Regulatory Response to their Marketing and Advertising Support the Conclusion That the FTC Does Not Control Or Direct Such Practices.

The FTC has neither compelled nor authorized Philip Morris to market its cigarettes as "light" or "lowered in tar or nicotine." Philip Morris voluntarily markets its cigarettes as "light," because this marketing of its cigarettes has proven highly profitable. The history of the development and marketing of cigarettes labeled as "light," "low tar," or "lowered in tar and nicotine," as well as the history of the FTC's quiescence in response to such marketing practices, requires the conclusion that in its marketing of its cigarettes Philip Morris "acted on its own." Brief for the United States as *Amicus Curiae* at 8-9, *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852 (8th Cir. 2005), *cert. granted*, -- U.S. --, 2007 WL 80665 (U.S. Jan. 12, 2007) (No. 05-1284).

A. 1950-1970: Early FTC attempts to regulate tobacco advertising

The illusory quest to develop and market a "safer" cigarette began after epidemiological studies in the 1950s established an increased risk of lung cancer among cigarette smokers. Widespread public dissemination of the results of these studies led to what the tobacco industry called a "health scare," as consumers became increasingly aware of the health risks associated with smoking. National Cancer

Institute, *Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, at 199 (2001) ("Monograph 13"), available at http://cancercontrol.cancer.gov/tcrb/monographs/13/. To appeal to increasingly health-conscious consumers, tobacco companies developed filtered cigarettes, which initially were marketed as containing explicit health benefits. *Id.*

The FTC, whose authority under Section 5(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 (a)(1), is to prevent "unfair or deceptive acts or practices in or affecting commerce," including tobacco advertising, became alarmed that tobacco companies' advertising claims were inaccurate and misleading. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). In 1955, the FTC advised tobacco companies not to make representations about the tar and nicotine levels of their cigarettes. *Id.*

The 1964 Surgeon General Report, which established cigarette smoking as a cause of lung cancer, at least in males, further increased public awareness of the health risks associated with smoking. The report also galvanized the tobacco industry, including Philip Morris, which recognized that its continued profitability rested on marketing cigarettes that assuaged health concerns but continued to deliver sufficient amounts of nicotine when smoked. Monograph 13 at 206.

In spite of the 1955 FTC advisory, tobacco companies aggressively marketed their cigarettes as having less tar than competitors', resulting in what the tobacco industry referred to as the "tar derby" or "tar

wars." In 1966, the FTC issued a policy statement indicating that a factual statement of the tar and nicotine content based upon the Cambridge Method would not be treated as deceptive as long as there were no express or implied representations in advertisements that the represented level of tar or nicotine reduced or eliminated health hazards. Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955).[2]

The Cambridge Method is a machine measurement of cigarette tar and nicotine yields that does not attempt to replicate the amount of tar and nicotine actually inhaled by human smokers, which itself varies based upon an individual's personal smoking behavior. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d. 1, 2006 WL 2380648, at *183-*84 (D.D.C. 2006). The Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37.

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[2] Such policy statements are not formally promulgated as a substantive rule with a public comment period. Therefore, they lack the force and effect of law, and merely advise how an agency believes it will exercise a discretionary power. As such, they are neither rules nor regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31, 315-16 (1979); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003) (stating that policy statements inform the public of an agency's views but do not create legal rights or obligations).

The FTC believed that the Cambridge Method "provide[d] smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997). In 1970, it initiated formal rulemaking proceedings to require tobacco manufacturers to disclose the tar and nicotine yields as determined by the Cambridge Method test.[3] 35 Fed. Reg. 12,671 (1970). However, the FTC never completed the rulemaking process. Instead, five major tobacco companies, including Defendant Philip Morris, as well as three minor producers, entered into a private, voluntary agreement to disclose Cambridge Method test data in cigarette advertisements.[4] The companies

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[3] The FTC exercises its authority under sections 5 and 13 of the FTC Act in two ways. First, the FTC may promulgate trade regulation rules that apply to an entire industry by publishing the proposed rule, soliciting public comment, and ultimately submitting the proposed rule to a formal vote of the FTC commissioners. 15 U.S.C. § 57b-3; 16 C.F.R. 1.7-1.20. Second, the FTC may bring an administrative or judicial enforcement action. 15 U.S.C. §§ 45, 53; *see* 16 C.F.R. 3.1, et seq. Such actions are frequently resolved through negotiated consent agreements between the FTC and the targeted member of industry. *See* 16 C.F.R. 3.25.

[4] There is no record evidence that Philip Morris ever included tar and nicotine ratings on the packages of either Marlboro Lights or Cambridge Light while representing these cigarettes to be "light" or delivering "lowered tar and nicotine" on its packaging. Actually, Philip Morris has admitted that it never included tar and nicotine ratings on these "light" cigarette packages. See *Aspinall v. Philip Morris, Companies*, Inc., No. 98-6002, 2006 WL 2971490 at *8 (Mass.Sup.Ct. Aug. 9, 2006)

entered into this voluntary agreement in order to avoid FTC regulation of their cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380648, at *183. This private agreement prompted the FTC to end its formal rulemaking proceedings. 36 Fed. Reg. 784 (1971); 62 Fed. Reg. 48,158 (1997). Notably, the FTC was not a party to the agreement and, as a result, it never established the agreement's terms as a "Trade Regulation Rule" pursuant to 15 U.S.C. § 57a. Thus, it did not have the authority to enforce the agreement. *See Brown & Williamson Tobacco Corp.*, 778 F.2d at 37.

B. 1971-1996: A mushrooming "light" tobacco industry in the dawn of an unregulated era

In 1971, Philip Morris introduced Marlboro Lights cigarettes nationwide as "light," while including the phrase "lowered in tar and nicotine" on all of its packaging.

Nevertheless, as early as the 1970s, Philip Morris internally recognized, based upon its sophisticated understanding of cigarette design and smoker compensation, that "low tar" or "light" cigarettes offered no clear health benefit. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380632, at *205-*07. While Philip Morris kept this information secret, it continued selling Marlboro Lights as "light" and "lowered in tar and nicotine" and publicly defended the Cambridge Method as a useful means of measuring tar and nicotine yields in "light" cigarettes.

1. Philip Morris's internal documents reveal that "[b]y 1978, Philip Morris had substantial evidence that

'filter dilution [which Philip Morris used to reduce tar and nicotine yields when testing by the Cambridge Method] was somehow acting to increase' the biological 'activity' of the whole smoke condensate ("WSC") collected from its cigarettes," *id.* at *206 - actually indicating that these "light" cigarettes were potentially more hazardous than regular cigarettes. Indeed, Dr. William Farone, who was the Director of Applied Research at Philip Morris from 1977 to 1984, has testified that:

> [I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential cancer risk. These studies were repeated multiple times over the past 20 years and continue to be repeated to this day. The Philip Morris data, as was used by Philip Morris, was a strong warning that their product design change between a Marlboro Red and a Marlboro Light - increased ventilation - resulted in a potentially more dangerous product.

Id. at *205. Dr. Farone has further testified that Philip Morris has not "changed the design of [Marlboro] 'Lights' cigarettes in response to its studies and knowledge concerning mutagenicity." *Id.*

Philip Morris was aware, as early as 1975, that, due to compensation, smokers got as much tar and

nicotine from Marlboro Lights as from regular Marlboros:

> Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers and Marlboro Lights smokers.... The panelists smoked the cigarettes according to physical properties; i.e., the dilution and the lower RTD of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro lights proportionally. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.

Id. at *216.

Nevertheless, Philip Morris continued to market Marlboro Lights as "light" and "lowered in tar and nicotine." James Morgan, former CEO of Philip Morris, testified that "Philip Morris made a calculated decision to use the phrase 'lower tar and nicotine' even though its own marketing research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option." *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2381449, at *34.

2. During this period, the FTC took no regulatory action regarding "light" cigarette advertising; nor did it take any regulatory action based on the Cambridge Method.

In the early 1980s, at the behest of defendant Philip Morris and fellow manufacturer R.J. Reynolds, the FTC sought an injunction in federal district court to stop Brown & Williamson from using the Cambridge Method to substantiate its claim that Barclay cigarettes yielded 1 mg of tar, because, according to the FTC, Barclay cigarettes had been designed to fool the Cambridge Method test. *Brown & Williamson*, 778 F.2d at 37. The injunction sought also would have forced Brown & Williamson to modify the standard Cambridge Method testing procedure to one that the FTC devised just for Barclay cigarettes. Although the D.C. Circuit concluded that Brown & Williamson's claims about the amount of tar and nicotine were deceptive and had to cease, it found, in an opinion by Judge Bork, that the FTC could not dictate how cigarettes are tested. *Id.* at 42. The court explained that to grant the requested injunction would "enshrine the current FTC system [Cambridge method] as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review." *Id.* Absent the use of such procedures, the court held that the FTC lacks the authority to require any particular tar and nicotine rating system. *Id.* The D.C. Circuit invited the FTC to "address the problem by promulgating a Trade Regulation Rule under section 18 of the Act." *Id.* To date, the FTC has not done so.

In fact, rather than promulgate a trade regulation rule "enshrining" the Cambridge Method, the FTC ceased conducting its own testing of "light" cigarettes in 1987, closing its laboratory. 62 Fed. Reg. at 48,158. The Tobacco Institute Testing Lab, an organization funded by major tobacco companies, took over the role of conducting the Cambridge Method tests after that, submitting the data to the FTC. *Id.* at 48,158, n.5.

The prevailing view within the public health and scientific communities in the 1970s and 1980s was that the Cambridge Method test data provided useful information to smokers who sought to compare the tar and nicotine yields of cigarettes. While a few members of the public health community questioned the usefulness of the data, because it did not reflect actual tar and nicotine yields, the FTC and the United States Surgeon General remained of the view that the data provided the ability to make useful comparisons between competing brands.

Based on the scientific evidence available to them, unlike the information available to tobacco manufacturers, public health authorities believed that a cigarette yielding less tar in the Cambridge Method tests would be likely to produce less cancer as well. Monograph 13 at 2. For example, in 1981, the United States Surgeon General recommended that smokers who could not quit were well advised to switch to "light" cigarettes. U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), available at http://www.cdc.gov/tobacco/sgr/sgr_1981/index.htm.

3. Philip Morris, on the other hand, had special knowledge of the Cambridge Method's limitations, in part because it had developed an alternative testing machine, the human smoke simulator, that could test for actual smoker nicotine and tar yields. A Philip Morris document dated September 17, 1975, from Goodman to Leo F. Meyer, the Philip Morris Director of Research, reflects the depth of Philip Morris's knowledge. As Dr. David M. Burns, an author of the 1981 Surgeon General's Report, has explained:

> [T]here are three things that are powerfully significant in this document: (1) It "very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were." (2) "[T]his is dated 1975, six years prior to the time the [1981] Surgeon General's Report reached its conclusion. And we did not have access to this information or comparable information." (3) "[T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship

> between delivery of tar and nicotine of these cigarettes when they were actually smoked. So . . . six years prior to the time we were reviewing that evidence for the Surgeon General, this information was available to Philip Morris."

Philip Morris USA, 2006 WL 2380648, at *216. Dr. Burns further testified, "Had that information been available to us, we would not have then offered the recommendation to the population of the United States that it would be a good idea to shift to these products." *Id.* at *193.

Philip Morris also internally recognized that the Cambridge Method data from its line of "light" cigarettes, which were designed with dilution filters, was false and misleading. A Philip Morris document dated August 11, 1967, from Helmut Wakeham, Vice President of Corporate Research and Development, to Paul D. Smith, Vice President and General Counsel, recognized that human smokers increased their smoke intake when switching from non-filter to filter cigarettes:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human

> smoker who appears to adjust to the diluted smoke by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appear to be erroneous and misleading. It has probably always been so for diluted smoke cigarettes, whether dilution is obtained by porous paper or holes in the filter.

Id. at *212. Philip Morris's own scientist, Dr. Jerry Whidby, has testified that "Product Opinion Laboratories was a facility established by Philip Morris to evaluate smokers' reaction to the cigarette brands Philip Morris was selling, as well as to Philip Morris' prototype cigarettes," and that he was not "aware of any instance, at any time between when Dr. Wakeham wrote this document in 1967 and when [Dr. Whidby] left the company in 1998, in which Philip Morris informed the American public directly of Wakeham's conclusions that the FTC tar and nicotine yields are apparently 'erroneous and misleading,'" and "dilution filter cigarettes generated lower FTC yields than non-dilution cigarettes, but delivered about the same amount of smoke to smokers." *Id.* (citing Dr. Jerry Whidby Dep.).

Dr. Farone has testified to the extraordinary significance of Mr. Wakeham's statements in this document:

> It shows that Philip Morris understood the puff compensation phenomenon. This document shows that by 1967, Philip Morris recognized that when you have dilution or ventilation, the mechanism for compensation is puff adjustment . . . this document [also] shows that Philip Morris knew in 1967 that human smokers compensated by increasing their smoke intake when switching from non-filter to filter cigarettes, and in doing so, smokers received the same amount of tar and nicotine from their filter cigarettes as from non-filter cigarettes. It also shows Wakeham's understanding that the FTC tar and nicotine yields for low tar cigarettes are erroneous and misleading.

Id.

C. 1997-Present: FTC reconsiders but does not adopt regulations governing "light" cigarettes as the United States prosecutes industry members for deceptive marketing practices related to "light" cigarettes

Beginning in the late 1990s, the public health authorities made several advances in their understanding of smoker compensation and cigarette design. These advances were made possible largely as a result of the availability for review of a large number of internal industry documents, including research reports, subsequent to litigation brought against the tobacco companies. *See* Monograph 13 at i-ii. Much of

this information is detailed in the National Cancer Institute's Monograph 13, which further came to the conclusion that "[w]idespread adoption of lower yield cigarettes in the United States has not prevented the sustained increase in lung cancer among older smokers." Monograph 13 at 10. The report then concluded that:

> [m]easurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette. The measurements also do not offer meaningful information on the relative amounts of tar and nicotine exposure likely to be received from smoking different brands of cigarettes.

Id.

In 1997, the FTC solicited public comment on whether it should regulate descriptors such as "light" or "low tar." 62 Fed. Reg. at 48,163. The FTC stated in its request that "[t]here are *no* official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used *by the industry* to reflect ranges of FTC tar ratings." *Id.* (emphasis added). The FTC ultimately did not take any regulatory action in this area.

In 1999, the United States brought suit in federal district court under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Philip Morris and tobacco-related entities,

several of whom were signatories to the 1971 voluntary agreement. With respect to Philip Morris, the United States alleged, in part, that it had engaged in a decades-long unlawful conspiracy to deceive the American public about the health benefits derived from smoking low tar, "light" cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380632, at *1.

As the Government's RICO suit proceeded, Philip Morris petitioned the FTC in 2002 to promulgate a trade rule that would require tobacco companies: (1) to disclose the average tar and nicotine yields of cigarette brands; (2) to define and regulate the use of descriptors such as "light" and "ultra light;" and (3) to mandate the use of disclaimers with respect to the average tar yield and the health effects of low-yield cigarettes. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). That petition was never acted upon by the FTC.

In August 2006, following more than two years of discovery and a trial at which countless scientists, government officials, and tobacco industry members testified, the federal district court held that Philip Morris had falsely marketed and continues to falsely market "light" cigarettes through its use of the descriptor "light" in violation of RICO. The court enjoined Philip Morris from using descriptors such as "light" in cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380681, at *1:

> "[T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American

> public about 'light' and 'low tar' cigarettes is to prohibit them from using any descriptor which conveys a health message. . . . By using descriptors such as 'lights' and 'low tar,' Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message."[5]

Id., 2006 WL 2380650, at *222.

II. The Eighth Circuit's View of the Applicable History is Erroneous

Although the Eighth Circuit was correct in recognizing that no FTC rule or regulation governs Philip Morris's use of "light" or other such descriptors in advertising, it was clearly erroneous in its conclusion that the FTC comprehensively controls Philip Morris's "light" cigarette marketing practices.

The Eighth Circuit erred in treating the 1971 voluntary agreement among select tobacco industry members as equivalent to an FTC regulation carrying the force and effect of law. The FTC, which was not a

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[5] The U.S. Court of Appeals for the District of Columbia has stayed that injunction pending an appeal.

party to that agreement, has no authority to enforce the agreement. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d at 37. As the court in *Brown & Williamson Tobacco Corp.* explained, because the "FTC had not adopted [the Cambridge Method] of testing pursuant to a Trade Regulation Rule . . . one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* at 36, 44.

Even if it were true that Philip Morris and other tobacco companies would not have agreed to report Cambridge Method data unless they felt compelled to do so, and had the FTC sought public comment on the proposed trade regulation rule, a private voluntary agreement would still not be enforceable by the FTC as an FTC regulatory requirement either against signatories to the agreement or non-signatories. The agreement, therefore, is not comparable to a trade regulation rule enacted pursuant to 15 U.S.C. § 57a, because it lacks the force and effect of law. *Id.* at 44. Moreover, there is no way to be certain that the FTC would have adopted the terms of the voluntary agreement if it had promulgated a trade regulation rule.

It is of no moment that the FTC once conducted testing pursuant to the Cambridge Method. Absent a rulemaking, the FTC lacks the authority to require any particular tar and nicotine rating system. *See id.*

2. The Eighth Circuit misconstrued the legal import of FTC reports to Congress, which on occasion have used the term "low tar" to refer to cigarettes measuring 15 milligrams or less in tar under the

Cambridge Method test. Such reports cannot establish a legally binding statement of an FTC regulatory position. [6] *See United States v. Anderson*, 82 F.3d 436 (D.C. Cir. 1996) (holding that a statement by the United States Sentencing Commission included in a special report to Congress was at most a policy statement). Only after following its applicable procedures may a federal agency affect the rights of individuals through regulation. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

Furthermore, FTC reports that have employed the term "low tar" or related descriptors have not purported to define these terms. The FTC has repeatedly assured Congress that it has never formally defined "'ultra-low tar,' or any term related to 'tar' level."[7] FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1979*, 11 n.8 (undated). As recently as 1997, in its request for comments on whether it should define "light" cigarette descriptors, the FTC reiterated that "[t]here are no official definitions for these terms," and that these terms merely reflect industry usage. 62 Fed. Reg. 48,158, 48,163 (1997).

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[6] This purported "low tar" definition was *never* used in the context of any enforcement proceeding, formal rule, guide, or policy statement that indicated the FTC's view on the legality of the use of the representation in advertising.

[7] *Watson*, 420 F.3d at 860-861 cites the testimony of C. Lee Peeler, Deputy Director of the Bureau of Consumer Protection on FTC testing, but does not describe the fact that Mr. Peeler also testified that "the FTC has no official view on descriptors on cigarette packages, that it has sought information and data, and that it has not taken a position 'one way or the other.'" *Aspinall*, 2006 WL 2971490 at *4.

Finally, nothing more clearly evidences that the FTC has never defined the term "light" than the fact that Philip Morris in 2002 petitioned the FTC to do just that. *See* Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). As has been stated, that petition has never been acted upon.

3. Contrary to the opinion of the Eighth Circuit, the 1971 consent order between the FTC and American Brands does not and cannot evidence FTC control over the cigarette marketing practices of any other tobacco company, including Philip Morris. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971).

This Court has consistently held that consent orders or decrees are contracts that only bind the parties thereto, and that "any command of a consent decree or order must be found within its four corners, and not by reference to any purposes of the parties or of the underlying statutes." *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 233 (1975) (internal quotation marks omitted). *See also California v. Am. Stores Co.*, 495 U.S. 271 (1990) (deciding merits of California's suit alleging that merger violated Clayton Act, which suit had been filed a day after the FTC had approved the proposed merger following American Stores Co.'s agreement to the terms of a consent order with the FTC); *see also Am. Stores Co. v. Comm'r of I.R.S.*, 114 T.C. 458 (Tax Ct. 2000) (holding that petitioner is not entitled to deduct the legal fees it incurred in contesting the State of California's antitrust suit, which was filed after American Stores had entered into a consent order with the FTC and the FTC had approved the merger at issue); *United States v. Armour & Co.*, 402 U.S. 673 (1971);

United States v. Atl. Ref. Co., 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

Further, since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation. *ITT Cont'l Banking Co.*, 420 U.S. at 236-37; *see Atl. Ref. Co.*, 360 U.S. at 23 (rejecting the Government's argument that its interpretation of a consent order would better serve "the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike," and explaining that, "[t]his may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues.").

Most importantly, because consent orders are contracts between the parties, they cannot bind non-parties. *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds in* The Civil Rights Act of 1991 (explaining that this "rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"). *See also Am. Stores*, 495 U.S. at 271. It is undisputed that Philip Morris was not a party to this 1971 consent order. Therefore, this 1971 consent order can have no legal effect regarding whether Philip Morris is compelled or authorized to use the descriptors "light" and "lowered in tar and nicotine" in advertisements or on packaging.[8]

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[8] As a factual matter, the 1971 consent order merely prohibited American Brands from using the terms "low,"

CONCLUSION

Philip Morris is not entitled to federal officer removal under the Eighth Circuit's test or any standard that ascribes weight to the comprehensiveness and detail of federal control, because it voluntarily markets Cambridge Light cigarettes and Marlboro Lights as "light" or "lowered in tar and nicotine" in a manner not subject to FTC control or direction. This Court should reverse.

Respectfully submitted,

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"lower" or "reduced" tar unless accompanied by a disclosure of the tar and nicotine yields of the advertised cigarette; it did not define those terms and did not approve the use of those terms. *In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971). Philip Morris's insistence that this consent order provides industry-wide guidance has no merit. The United States has stated that the "[1971] decree did not reflect an FTC position on the proper definition of low tar." Brief for United States at 9. Nor is Philip Morris's position even plausible, given that it petitioned the FTC to promulgate a regulation in 2002 on the basis that the use of these descriptors would provide guidance to the industry. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC, filed Sept. 18, 2002).